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QUESTION PRESENTED

Whether the Equal Protection Clause permits a State, as one alternative in a primarily coeducational system of higher education, to afford its citizens the option of receiving the acknowledged benefits of single-sex education through methodologies designed by professional educators to accomplish optimal and substantively comparable pedagogical results for both women and men.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-1941

UNITED STATES OF AMERICA
Petitioner,

v.

COMMONWEALTH OF VIRGINIA, *et al.*,
Respondents.

No. 94-2107

COMMONWEALTH OF VIRGINIA, *et al.*,
Cross-Petitioners,

v.

UNITED STATES OF AMERICA
Cross-Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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BRIEF FOR THE RESPONDENTS

Respondents respectfully submit this brief in response to the brief for the petitioner in No. 94-1941.

INTRODUCTION

In addition to 14 diverse coeducational colleges and universities, the Commonwealth of Virginia offers students of either gender the opportunity to enroll in a public single-sex college program that is designed by experts in education to develop leadership and character through a comprehensive system of curricular and co-curricular activities including military training. Male students are offered this opportunity through the Virginia Military Institute (VMI), an his-

torically all-male undergraduate institution; female students are offered this opportunity through the Virginia Women's Institute for Leadership (VWIL), a state-supported program at Mary Baldwin College (MBC), an historically all-female private college. The question addressed in this brief is whether the Equal Protection Clause permits the Commonwealth to offer this combination of coeducational and single-sex educational opportunities for men and women.

STATEMENT

Petitioner's opening brief in No. 94-1941 presents an incomplete picture of the VWIL program and glosses over or contradicts crucial facts found by the courts below. This brief sets forth a more accurate and representative statement of the record and the remedial proceedings below.[1]

A. Mary Baldwin College

Mary Baldwin College (MBC), an historically women's college, was founded in 1842. MBC has responded to the changing role of women in society by expanding its curriculum "to include the new options open to women in business and the professions." Pet. App. 122a. MBC has "developed an emphasis on career planning," has "computerized the campus," and has added "new state of the art equipment for its science labs." *Id.* at 122a-23a. MBC "is committed to the education of women for a world of expanding opportunity." *Id.* at 122a.

MBC enrolls over 700 residential undergraduate students, has a Phi Beta Kappa chapter, is accredited by the Southern Association of Colleges and Schools, and is now ranked

[1] In their opening brief as cross-petitioners in No. 94-2107 (Va. Br.), respondents set forth the facts concerning Virginia's system of higher education and the educational program offered at VMI. *See* Va. Br. 5-14.

first among regional liberal arts colleges in the South. *See* U.S. News & World Rep. 141 (Sept. 18, 1995); *see also* II DX 125 at 123. MBC's 55-acre campus in Staunton, Virginia, includes the facilities of the former Staunton Military Academy, residence halls, classroom buildings, computer and science laboratories, a 40,000-square-foot physical education facility, playing fields, tennis courts, and a swimming pool. Pet. App. 123a, 126a-29a.

The student-faculty ratio in MBC's residential program is 11 to 1. MBC offers 28 undergraduate majors, including degrees in mathematics, the sciences, business, and the arts, and also offers pre-law and pre-med programs and a joint-degree engineering program with the University of Virginia. 94-1941 Br. in Opp. App. (Opp. App.) 17a, 19a-23a; Pet. App. 123a-24a. MBC is "geared in the direction of trying to encourage women to persist in math and physics." *Id.* at 126a.

MBC enjoys "a record of success in developing new programs and operating distinctive and unique programs within the larger traditional undergraduate residential community." Pet. App. 125a. For example, MBC has successfully established a unique residential baccalaureate program for academically gifted, high-school-age students tailored to "the academic, emotional and developmental needs of young women." *Id.* at 126a.

B. The Virginia Women's Institute For Leadership

1. Development of the VWIL Program

After the initial decision of the court of appeals in this case, the Commonwealth consulted with education experts regarding the concept of a program for women parallel to VMI and then asked MBC to develop a publicly funded single-sex college leadership program with military training designed to accomplish the same results for women that VMI achieves for men. In 1993, MBC established a Task

Force to design a college program for women that "would prepare them for leadership positions in civilian and military life." Pet. App. 101a, 102a. The members of the Task Force, most of whom are experts in women's education at the college level, were appointed by Dr. Cynthia H. Tyson, President of MBC and herself an expert in single-sex education for women and in women's leadership and educational development. *Id.* at 63a, 93a, 102a.[2]

The Task Force was co-chaired by Dr. James D. Lott, Dean of MBC and an expert in single-sex education and leadership education for women, and by Dr. Heather Anne Wilson, Dean of Students at MBC and an expert in the psychological, social, emotional, and intellectual development of college women. Pet. App. 63a, 91a, 94a, 102a.[3] The

[2]Petitioner's assertion (U.S. Br. 8) that the Task Force was "selected by respondents" is, quite simply, false. Pet. App. 102a; II Tr. 76.

[3]Petitioner denigrates the testimony of Dr. Wilson, suggesting (U.S. Br. 9 n.4) that her conclusions were based solely on the year she spent as a sorority advisor. *See* II DX 123. In fact, however, Dr. Wilson has a doctorate in higher education as well as master's degrees in counseling and in institutional planning and research, and she has more than 20 years of experience in higher education at both coeducational and women's institutions, including experience developing leadership programs for women. Pet. App. 94a-95a; II Tr. 326-28, 333 (II JA 584-86, 591). Her testimony covered far more ground than the brief aside quoted out of context by petitioner, and was based on the totality of her extensive and varied experience in higher education. II Tr. 324-58. Petitioner's demeaning caricature will come as no surprise to Dr. Wilson; petitioner's attempt to portray the VWIL program as based on invalid stereotypes was the charge she "f[ou]nd most offen[sive]. Between us, Dr. Tyson and Dean Lott and I have over 70 years of experience in advancing young women. We are not the sort of people who deal in stereotypes." II Tr. 342 (II JA 600).

Task Force included MBC faculty, administration, and student representatives. Pet. App. 102a-03a.

The Task Force "made an in-depth study of the published literature on the developmental psychology of women and the cognitive development of women" and "consulted outside experts" in addition to drawing on its own extensive collective experience in women's education. Pet. App. 63a, 103a. The Task Force was assisted by Dr. Richard C. Richardson, Jr., Professor of Educational Leadership and Policy Studies at Arizona State University, an expert in higher education and in the development of academic co-curricular programs. Pet. App. 63a, 91a-92a. Dr. Richardson has chaired 25 college accreditation teams, including the team that most recently evaluated the United States Military Academy at West Point. *Id.* at 92a.

The Task Force conducted "a detailed study of the appropriate methods by which the leadership program should be structured." Pet. App. 63a. Its members reviewed materials from VMI, met with their counterparts at VMI, examined "the VMI methodology and outcomes," and "observed VMI's holistic education" on visits to VMI. *Id.* at 104a; II Tr. 84-85, 87, 92 (II JA 430-31, 433, 438).[4] The Task Force "considered carefully, in light of their collective experience and the literature on women's education, where VWIL should follow or depart from the VMI methodology to produce the same outcomes." Pet. App. 104a. After detailed study, the Task Force concluded that VWIL should embody challenge in all parts of its program but that the optimal methods "for educating and training most women for leadership roles" in a single-sex college environment do

[4]Thus, petitioner is incorrect in asserting (U.S. Br. 8) that the "Task Force did not consult anyone at VMI in planning the curriculum."

not include certain aspects of the VMI system. *Id.* at 63a.

The Task Force's goal was to create the best system for educating the young women who would attend VWIL, not blindly to copy every aspect of VMI's program. As Dr. Richardson explained, "the 'adversative' educational model has never been advanced by anyone as an appropriate paradigm for optimizing the development of women." II DX 11K at 4 (L. 308). Indeed, that system's inappropriateness "is evident from its abandonment or substantial modification in such military settings as the federal military academies and Virginia [Polytechnic] following coeducation." *Id.* The Task Force found

> no evidence that an extreme adversative environment . . . is appropriate for young women; we do find solid evidence, however, that an organized and disciplined environment which has as its purpose the building up of self confidence through mastery of physical, intellectual, and experiential challenges, *is* appropriate, is in fact the optimum environment for the education and training of women leaders.

II DX 39 at 3-4 (L. 329-30). The Task Force's members found little or no demand for a women's program identical to VMI. II Tr. 127, 340-41 (II JA 473, 598-99).

While it would have been "'easier to design'" the VWIL program to resemble VMI more closely, MBC determined that such a program would have had "'no real prospect of successful implementation.'" Pet. App. 11a. MBC felt that it would have been "'professionally irresponsible to compromise student welfare by designing a program to meet litigation objectives instead of student needs.'" *Id.*

Accordingly, the Task Force designed VWIL to develop women leaders through use of a "method which reinforces

self-esteem rather than the leveling process used by VMI." Pet. App. 64a.[5] The VWIL program is analogous to "the holistic VMI program, bringing together the co-curricular and the curricular to promote the student's development in all phases of her life." *Id.* at 63a. That program has been successfully implemented, and more than 40 women are presently enjoying the educational benefits of the VWIL program as its first-year class. TSR at 2.[6]

2. Description of the VWIL Program

VWIL offers women students the opportunity to obtain a single-sex undergraduate education with military training in an integrated program designed "to produce 'citizen-soldiers who are educated and honorable women, prepared for the varied work of civil life, qualified to serve in the armed forces, imbued with love of learning, confident in the functions and attitudes of leadership, and possessing a high sense of public service.'" Pet. App. 107a. Like VMI, VWIL offers an integrated and "highly structured program" that combines "the co-curricular and the curricular to promote the student's development in all phases of her life" and that pursues "the same five goals as those pursued at

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[5]Petitioner misleadingly implies that VWIL was designed to reflect "*respondents'* views of 'the differences and the needs of college-age men and women.'" U.S. Br. 8 (emphasis added). Nothing could be further from the truth. As the evidence and findings below clearly show, respondents did not dictate or control the design of the VWIL program. VWIL was designed by experts in single-sex education from MBC and elsewhere, not by the Commonwealth or VMI. It embodies those *experts'* views of the best methodology for developing the leadership skills of women college students in a single-sex environment.

[6]"TSR" refers to Defendants' Third Status Report, which was filed in the district court on October 31, 1995. Ten copies of that document have been lodged with the Court.

VMI: education, military training, mental and physical discipline, character development, and leadership development." *Id.* at 8a, 63a, 103a-04a. MBC is committed to making VWIL work and will make improvements as necessary to ensure the program's continued success. *Id.* at 30a, 106a; Opp. App. 13a-14a; II Tr. 1528-30 (II JA 1078-80).

As part of the VWIL program, students must demonstrate computer and foreign language proficiency and complete courses in calculus, statistics, and laboratory sciences. In addition, they must complete an extensive leadership development program including an externship and laboratory and speaker activities. *Id.* at 9a, 64a-65a, 108a-09a.[7]

As at VMI, VWIL's co-curricular offerings combine with the academic curriculum to create a comprehensive leadership-building experience. Women enrolled in VWIL are required to complete four years of ROTC, which is now offered through cross-enrollment agreements between MBC and the ROTC units at VMI.[8] VWIL students use the same ROTC curriculum, methods, and physical training and evaluation activities, and receive the same leadership training and military career opportunities, as all other ROTC students. Opp. App. 12a-13a; Pet. App. 67a, 109a, 116a-17a. VWIL students also constitute a corps of cadets, wear uniforms, receive military drill and ceremony training, and

[7]MBC offers VWIL students a variety of science and mathematics majors as well as an opportunity to obtain a state-supported degree in engineering through a dual degree program with the nearby University of Virginia. *See supra* p.3.

[8]Petitioner incorrectly suggests (U.S. Br. 9-10 & n.6) that VWIL students will participate in the "Mary Baldwin ROTC program" that existed, with little student participation, prior to the creation of VWIL. Instead of that Army ROTC unit, VWIL students select from the same Air Force, Navy/Marine Corps, and Army ROTC units offered to VMI students.

participate in the Virginia Corps of Cadets, which consists of all VWIL, VMI, and Virginia Polytechnic Institute and State University (VPI) cadets. *Id.* at 110a; Opp. App. 13a. A chain of command has been established within VWIL, and each upperclass VWIL student will be assigned a military rank. Pet. App. 110a; TSR at 5 and Exh. 6.[9]

VWIL students are required to complete eight semesters of physical and health education, including self-defense and an advanced fitness course designed especially for VWIL students. Pet. App. 111a. They take a strength and endurance test each semester based on the national military standards for women, and must take additional physical training until they have passed the test. TSR at 5. They receive special "training in self-defense and self-assertiveness" as part of a Leadership Challenge Program that is mandatory for all freshman VWIL students except those participating in varsity sports and is "designed to be analogous to the VMI 'rat challenge'" physical fitness program. *Id.* at Exh. 5; Pet. App. 112a. VWIL's physical training program "is based on the VMI physical education program" and "is designed to be comparable in rigor and challenge to the physical training test for men at VMI." *Id.*[10] VWIL's physical training component "will produce women who are capable of serving physically in the military service." *Id.* at 113a.

Before the start of their freshman year, VWIL students (like VMI students) participate in a special "cadre week

[9]Thus, petitioner errs in asserting (U.S. Br. 9-10) that "VWIL would provide no military framework or training other than the Mary Baldwin ROTC program."

[10]In addition to MBC's physical education facilities, VWIL students have access to VMI's facilities for various activities. Pet. App. 113a; *see* TSR at Exh. 5.

orientation" designed to provide "a physically and mentally demanding experience which will foster bonding and which will be a paradigm for VWIL itself." Pet. App. 110a, 114a. This year's program included physical training, ROTC orientation, training in military drill and ceremonies, and a 4-day wilderness orientation. TSR at 3.

Freshmen VWIL students room together in freshman residence halls and are subject to a variety of regulations, including room and uniform inspections and mandatory study periods. Pet. App. 114a; TSR at 4, 6-7. "[T]he VWIL program will use the highly disciplined schedule of the VMI model." Pet. App. 66a-67a, 114a. After their freshman year, VWIL students are required to live for at least one year in the VWIL House, which is the center for VWIL meetings and activities. *Id.* at 115a-16a.

Upperclass VWIL students will serve as mentors for incoming VWIL students. Pet. App. 115a.[11] In addition, upperclass students will play an important role in orienting incoming students, enforcing rules and regulations, teaching VWIL standards and expectations, organizing and directing drills, and leading the VWIL Corps. *Id.* at 115a-16a.[12] VWIL students are subject to MBC's honor code, which (like VMI's honor code) proscribes lying, cheating, stealing, and failure to report any of those infractions. *Id.*

[11]Petitioner asserts (U.S. Br. 11) that VWIL will not use VMI's mentoring system (known as the "dyke" system, *see* Pet. App. 196a-97a, in reference to the cross-belted dress uniforms worn by VMI students, *see* I Tr. 142 (I JA 390)), but petitioner cannot identify any meaningful difference in the goals of these two mentoring programs.

[12]Thus, contrary to petitioner's assertion (U.S. Br. 11), upperclass VWIL students will have expanded leadership roles and organizational duties similar to those given to upperclass VMI students through VMI's "class" system. *See* Pet. App. 196a.

at 114a-15a; II Tr. 1526 (II JA 1076); II DX 82 at 24.

Both the Commonwealth and VMI have provided extensive financial and other support for the development and implementation of VWIL, and they and MBC are committed to the program's continued success. Pet. App. 68a, 81a-83a, 102a-06a. The Commonwealth has expressed "unambiguous and unequivocal support of single-sex education for men and women," and the highest-ranking Virginia officials "have strongly supported VWIL." *Id.* at 81a, 83a. Virginia's General Assembly has enacted legislation mandating equal funding on a per-student basis for VWIL and VMI, without any limit on the maximum number of VWIL students. *Id.* at 10a, 80a & nn. 18-19; Opp. App. 12a.

VMI has cooperated extensively in the development and implementation of VWIL, and "has committed to support the VWIL program." Pet. App. 102a, 105a. VMI and MBC have formed a joint leadership education advisory board that will monitor the outcomes of the two programs. *Id.* at 105a; Opp. App. 6a, 14a; *see also id.* at 17a, 24a-26a. The VMI Foundation has provided substantial financial support for VWIL and is committed to providing an additional $5.5 million endowment once final court approval has been obtained. Pet. App. 120a; Opp. App. 6a-7a, 12a.

VMI is providing VWIL with full access to and support from its alumni network. VMI alumni and admissions personnel assist in recruiting for VWIL. Pet. App. 120a-21a; Opp. App. 3a, 5a, 10a, 14a. The VMI Alumni Association has opened its placement services and networks to VWIL, will assist VWIL students in obtaining leadership externships, and has begun to develop joint alumni networking opportunities with MBC. *Id.* at 6a; Pet. App. 120a-21a. VMI's alumni are "extremely supportive" of VWIL and are "committed to making [it] work." *Id.* at 121a.

C. The District Court's Remedial Decision

After a trial, the district court found that the single-sex programs at VWIL and VMI comply with the Equal Protection Clause. Rejecting petitioner's argument that Virginia was required to provide an exact replica of VMI for women despite the contrary recommendations of experienced educators, the court expressly found that "VWIL is a good design for producing female citizen-soldiers" and that "the differences between VWIL and VMI are justified pedagogically and are not based on stereotyping." Pet. App. 67a, 76a. In support of these findings, the court relied upon expert testimony that "the VWIL approach towards educating and preparing women leaders was preferable to the VMI approach" and indeed that "the demand for an all-women's VMI would be so small as to make the project unfeasible," whereas "there would be much more significant demand for VWIL." *Id.* at 73a, 75a & n.12.

The court relied on the testimony of Dr. Elizabeth Fox-Genovese, "one of the leading experts on the educating of women," who testified that "an adversative method of teaching in an all-female school would be not only inappropriate for most women, but counter-productive," because it would be destructive of women's self-confidence. Pet. App. 64a, 74a. Petitioner did not offer the testimony of *any* experts in single-sex education to refute this testimony. Moreover, the court expressly rejected the testimony of petitioner's expert in psychology, who asserted that the differences in methodology at VMI and VWIL were based on stereotypes. The court explained that this expert's "testimony was contradicted by most of the evidence in the record." *Id.* at 72a-73a. Indeed, even this expert acknowledged that there were developmental differences between college-age men and women and that women would "have more chances for leadership at single-sex institutions." *Id.*; II Tr. 914, 916, 918-19 (II JA 869, 871, 873-74).

The district court also found that the evidence "supplies a reasonable basis for predicting [VWIL's] success in attaining its stated goals" of producing citizen-soldiers well prepared for leadership roles in civilian and military life. Pet. App. 83a. Based on the experts' conclusions that "the methods adopted for the VWIL will produce the same or similar outcome for women that VMI produces for men" (*id.* at 64a) and that "VWIL will produce the kind of self-assurance in the face of accomplishment of difficulties that VMI offers" (*id.* at 75a-76a), the district court rejected petitioner's argument that the Constitution requires that single-sex institutions be identical in every respect. Instead, the court held that VWIL remedied any constitutional violation because it "will achieve substantially similar outcomes in an all-female environment and . . . there is a legitimate pedagogical basis for the different means employed to achieve the substantially similar ends." *Id.* at 76a.

D. The Court of Appeals' Remedial Decision

The court of appeals affirmed. In addition to the two-pronged test of *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), the court applied a third requirement, which entails "carefully weighing the alternatives available to members of each gender denied benefits by the classification" in order to determine whether those alternatives are "substantively comparable." Pet. App. 17a.[13]

Turning to the first prong of the *Hogan* test, the court reaffirmed the district court's factual finding that "single-gender education at the college level is beneficial to both

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[13]Petitioner appears to argue (U.S. Br. 13) that the court of appeals failed to apply the two prongs of the test enunciated in *Hogan*, but the court of appeals made clear that its analysis included both prongs of that test. *Compare* Pet. App. 16a *with* 458 U.S. at 724.

sexes," and concluded that offering "single-gender education as one particular pedagogical technique among many" is "a legitimate and important governmental objective." Pet. App. 20a, 21a. The court next held that the Commonwealth's decision to provide single-sex education through VMI and VWIL was directly related to the Commonwealth's legitimate and important objectives, because "the only way to realize the benefits of homogeneity of gender is to limit admission to one gender." *Id.* at 22a. In addition, the court found that "single-gender education at VMI is also directly related to achieving the results of" the VMI system, because essential "'characteristics of VMI's program'" were incompatible with a coeducational environment. *Id.* at 6a-7a, 23a.[14]

The court also concluded that the benefits offered by VMI and VWIL were "substantively comparable." Pet. App. 24a-28a. After scrutinizing the two programs, the court found that "the mission and goals are the same, and the methodologies for attaining the goals, while different, nevertheless are reasonably calculated to succeed at each institution." *Id.* at 27a. The differences in the two programs are justified because they are "attributable to a professional judgment of how best to provide the same opportunity." *Id.* at 26a. Indeed, as the court explained, providing women with a program identical to VMI would not be consistent with reasoned educational theory and experience, because "[e]ducational experts" believed that many women "may not respond similarly" to an adversative approach and that a women's program identical to VMI "would attract an insufficient number of participants to make the program work." Pet. App. 27a.

[14]Petitioner suggests (U.S. Br. 14, 29-30) that this conclusion was predicated on the court's remark that direct cross-sex harassment in an adversative setting would destroy "'any sense of decency that still permeates the relationship between the sexes.'" In fact, however, this conclusion was based on and supported by extensive evidence and findings from the liability phase of the case which demonstrated conclusively that VMI's method would have to be changed substantially if it were to be implemented in a coeducational setting, thus precluding any student from obtaining the benefits derived from that method. Pet. App. 6a-7a; Va. Br. 16-19, 34-36; *see infra* pp. 43-47.

The court of appeals accordingly upheld the remedy approved by the district court. In order to ensure the effective and successful implementation of VWIL, the court remanded the case to the district court with instructions to oversee the remedy. Pet. App. 30a.

SUMMARY OF ARGUMENT

The fundamental question presented in this case is whether a State may offer the option of single-sex education to both men and women as part of a diverse and primarily coeducational system of higher education. It is an established and unchallenged fact in this case that single-sex education offers substantial pedagogical advantages to many young men and women. Both VMI and VWIL therefore advance important and legitimate state objectives by offering college students of both genders a comparable opportunity to obtain an affordable single-sex education in a program emphasizing leadership and character development.

It is also an established fact that VWIL and VMI offer comparable educational benefits to their respective students. VWIL and VMI are each designed to achieve the same goals and use similar methods to achieve those goals. Both programs offer leadership and character development through an interconnected system of curricular and co-curricular activities including challenging course requirements, a rigorous physical fitness program, extensive military training through ROTC, a disciplined schedule, a mentoring program, an honor code, and a system of increasing re-

sponsibilities and leadership roles for upperclass students. Both combine these attributes with the proven benefits of a single-sex residential setting to provide an environment for the development of leadership and character.

The only differences between VMI's and VWIL's programs reflect the considered judgments of professional educators as to the most effective methods for educating their respective students. VWIL's design is based on observable psychological and sociological norms that even petitioner's experts conceded are real, not on archaic or harmful stereotypes of the type condemned in this Court's cases. The differences in technique between VMI and VWIL are directly attributable to a reasoned analysis of modern scholarship and professional determinations regarding the most successful techniques for educating women college students for leadership roles in modern society. Moreover, it was established below that there is insufficient demand among women college students for a precise replication of the VMI methodology, so the differences between VWIL and VMI are independently justified by the need to attract a student body large enough for the program to be effective.

VMI and VWIL do not foster or perpetuate impermissible and outmoded stereotypes about women's role in society. To the contrary, VWIL and VMI together reflect the conviction that women and men are equally well suited for leadership roles in all walks of life, and VWIL's graduates will be every bit as qualified as VMI's to assume leadership positions in the military and elsewhere. Indeed, it is stereotypical to presume that a women's single-sex college program must mimic every aspect of VMI to be successful. Thus, Virginia unequivocally supports the proposition that men and women are equally capable of serving society in positions requiring tough and aggressive leaders. But Virginia also believes (and the courts below found) that single-sex education is the best means for preparing some

young people for such roles, and that professional educators -- not lawyers or judges -- should be given the discretion and academic freedom to use their expertise in designing effective and successful single-sex educational programs.

There is no merit to petitioner's argument that the single-sex admissions policies of VWIL and VMI are unconstitutional if there exists a single person who would prefer the program offered by the other institution. If petitioner were correct, there could be no public support for single-sex education at any level. Moreover, petitioner's argument is inconsistent with numerous precedents of this Court recognizing that government may classify on the basis of gender as long as the classification is "substantially related" to achieving an important governmental interest.

Coeducation is not the only permissible educational methodology for Virginia and other States. Indeed, because VWIL offers women (as VMI offers men) the benefits of single-sex education as well as the additional advantages of a rigorous leadership and character development program, petitioner's preferred remedy would be *less* effective than that provided by Virginia and approved by the courts below. Petitioner's claim that VMI could become coeducational without meaningfully changing its program is contrary to the record and findings below. The finding that VMI could not offer the benefits of its program if it were to become coeducational reflects, not impermissible stereotyping, but the reasoned conclusions of expert witnesses and the experience of other institutions demonstrating that fundamental characteristics of the VMI system would be changed dramatically in a coeducational setting. Coeducation at VMI would destroy both its single-sex nature and important elements of its adversative system, thereby eliminating diversity while offering no educational opportunity to women that is not already available elsewhere.

Petitioner's proposal that strict scrutiny should apply to

gender classifications is not properly presented. Petitioner failed to raise that question below, the courts below did not address it, and petitioner affirmatively disclaimed reliance on that standard both in this Court and in the courts below. In any event, petitioner offers no special or compelling reasons for departing from the Court's precedents in this area.

ARGUMENT

The central, though unspoken, premise of petitioner's brief is that the Constitution should be construed to forbid public single-sex education. Even while effectively conceding that single-sex educational programs offer proven and demonstrable educational benefits to many students, particularly those from disadvantaged backgrounds who are least able to afford a private education, petitioner seeks to impose on the Nation its dogmatic view that coeducation is the only permissible methodology for all public schools. Fortunately, neither precedent nor public policy supports petitioner's attempt to substitute its own preferences for the reasoned analyses and scholarly conclusions of the professional educators responsible for creating and maintaining the valuable and beneficial single-sex programs at issue in this case.

The facts of this case reveal with irresistible force the importance of preserving the ability of state and local governments to offer single-sex programs like VWIL and VMI as a complement to their primarily coeducational systems of public education. Rather than address those facts on the merits, petitioner repeatedly ignores or substitutes its own unsubstantiated opinions for the findings below on a host of issues, from the sincerity of respondents' interest in single-sex education to the impact of coeducation on the educational experience offered by VMI. It is settled law, however, that this Court will not set aside facts found by two lower federal courts. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *United States v. Doe*, 465 U.S. 605, 614 (1984). Petitioner's attempts to rewrite the record and findings at this stage of the case and its last-minute advocacy of a new and higher standard of review betray petitioner's apparent recognition that it cannot prevail on the actual record below or the legal standard heretofore applied by this Court to issues such as these. Petitioner's approach is contrary to this Court's settled practice and should not be permitted to succeed.

I. THE SINGLE-SEX ADMISSIONS POLICIES AT VWIL AND VMI SUBSTANTIALLY ADVANCE LEGITIMATE AND IMPORTANT GOVERNMENTAL OBJECTIVES

Under *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), a public college's single-sex admissions policy is permissible if it "serves 'important governmental objectives'" and is "'substantially related to the achievement of those objectives.'" 458 U.S. at 724. VWIL and VMI are constitutional under that standard.

The courts below found, based on modern research and extensive expert testimony, that single-sex education provides unique benefits for many college students of both sexes. *See* Va. Br. 14-15, 26-27.[15] The district court explained that "[t]he record is replete with testimony that single gender education at the undergraduate level is beneficial to both males and females." Pet. App. 167a. It found that "[b]oth men and women can benefit from a single-sex education" and that "the opportunity to attend a single-sex college is a valuable one, likely to lead to better academic and professional achievement" for some students. *Id.* at 168a, 174a, 225a-27a. The court concluded that the "virtually

[15]Even petitioner conceded below that "there is ample evidence in the record on the value of single-gender education." II Tr. 238.

uncontradicted" evidence supports "Virginia's view that substantial educational benefits flow from a single-gender environment, be it male or female, that cannot be replicated in a coeducational setting." *Id.* at 176a.

The court of appeals affirmed these findings, holding that single-sex education "provid[es] substantial benefits to college students" and "has been found to have salutary consequences for sexual equality in the job market." Pet. App. 149a. The court also found that "[t]he experts for both sides in this case appear to agree with" these conclusions. *Id.* at 150a; *see id.* at 168a, 225a. Thus, it is "a fact established in this case" that "single-gender education at the college level is beneficial to both sexes." *Id.* at 20a.

As respondents have already explained in detail, the proven benefits of single-sex education are a central and important part of the overall experience afforded to VMI's students. *See* Va. Br. 24-36; Pet. App. 61a, 148a, 227a. Indeed, both courts below concluded that "the legal justification for VMI's all-male admission policy [i]s contained in the benefits that flow from a single-sex education." *Id.* at 61a. While Virginia had historically afforded women the same opportunity to receive the benefits of single-sex education at publicly supported women's colleges and universities, Virginia's public women's colleges and universities each chose to become coeducational in recent years. *See* Va. Br. 6-7.[16] Virginia has now remedied this anomaly by creating VWIL, which (in addition to paralleling other aspects of VMI's program) replicates the benefits of VMI's single-sex educational environment by reestablishing public

[16]The Commonwealth has continued to provide financial support for women's single-sex college education through various programs of aid and assistance to Virginia's private colleges, including several women's colleges. *See* Va. Br. 8-9.

single-sex education for women in Virginia.[17]

Petitioner has never challenged directly the factual *finding* that single-sex education provides substantial pedagogical benefits for some men and women that cannot be replicated in a coeducational setting. Instead, petitioner offers only the *ipse dixit* that "[c]ontrary to the *assumption* of the court of appeals, single-sex education is not self-justifying," and contends, without any basis in fact, that respondents do not "have a genuine interest in providing single-sex education to college students in Virginia." U.S. Br. 45 n.32, 47 (emphasis added).

As respondents have demonstrated (Va. Br. 24-28), however, States have an important and legitimate interest in providing diverse and beneficial educational options to their citizens. The record and findings in this case clearly establish that single-sex education has proven benefits for many students at the college level and enhances the diversity of a State's educational offerings. Petitioner disputes none of these propositions, and thus there can be no doubt that the objective of providing the benefits of single-sex education as part of a large, diverse, and primarily coeducational system of higher education is an important and legitimate one.

It is equally clear that respondents have a genuine interest

[17]Indeed, VWIL may surpass VMI in this respect; the district court found that the benefits of a single-sex college education are, if anything, "stronger among women than among men." Pet. App. 174a. Contrary to petitioner's suggestion (U.S. Br. 46), moreover, women are not limited to the VWIL single-sex option. Virginia offers a wide menu of public coeducational opportunities at the college level, including the residential Corps of Cadets and ROTC unit at VPI, which (like VMI and VWIL) emphasizes leadership and character development and military training. Pet. App. 214a-18a; Stipulations 49-54 (I JA 94-99; L. 76-81); *see also* Va. Br. 9-10.

in achieving that objective. Petitioner's contrary argument is fully answered elsewhere (*see* Va. Br. 28-32) and in any event rests entirely on circumstances that no longer exist. Petitioner completely ignores the findings below that, in establishing VWIL, respondents have unequivocally demonstrated the genuineness of their support for single-sex education for both men and women in Virginia. The district court found as a matter of fact that "[t]he record in this case shows the Commonwealth's unambiguous and unequivocal support of single-sex education for men and women." Pet. App. 81a; *see id.* at 81a-83a & n.20. Indeed, "every person in Virginia's officialdom who has or has had the authority to affect Virginia's policies on higher education has spoken in favor of diversity by offering single-sex education to men and women of the Commonwealth." *Id.* at 83a; *see also id.* at 29a.

The single-sex admissions policies at VMI and VWIL are also substantially related to the achievement of important governmental objectives. Plainly, "the only way to realize the benefits of homogeneity of gender is to limit admission to one gender." Pet. App. 22a. Exclusion of men from VWIL and women from VMI is directly and precisely related to achieving the legitimate and important objective of providing the benefits of a public single-sex college education to the students who seek them.

The single-sex nature of the educational experience at VMI and VWIL is also central to the attainment of the additional benefits provided by those programs' specific emphasis on leadership training and development. VMI's methodology is inextricably connected to its single-sex environment (*see infra* pp. 43-47; Va. Br. 33-36), and VWIL is designed to maximize the benefits of its leadership program by capitalizing on the single-sex nature of the program. Indeed, the MBC Task Force found that, because of the need to combat cultural stereotyping, "[l]eadership development for women will be most effective . . . if it takes place in a single-sex environment of challenge and support . . . ." II DX 39 at 3 (II JA 255; L. 329).[18] Thus, the single-sex admissions policies at VWIL and VMI are substantially related to the achievement of important state objectives, and they satisfy the requirements of *Hogan*.

II. THE VWIL PROGRAM FULLY REMEDIES ANY CONSTITUTIONAL VIOLATION THAT MAY HAVE EXISTED AS A RESULT OF VMI'S SINGLE-SEX ADMISSIONS POLICY

A. VWIL Offers Educational Benefits To Women That Are Comparable To Those Provided To Men By VMI

Petitioner contends (U.S. Br. 22-23, 42-43) that VWIL does not remedy the constitutional violation found by the court of appeals because women continue to be denied the benefits of attending VMI. That contention is refuted fully by the record and findings below, which demonstrate that the ultimate benefits afforded to VWIL's students are equivalent to those received by students attending VMI.

VMI's mission is "to produce educated and honorable men who are suited for leadership in civilian life and who can provide military leadership when necessary." Pet. App. 203a. The courts below found that VMI accomplishes that mission by providing its students both the proven benefits of a single-sex college education and the additional benefits of VMI's educational method, which combine to produce self-discipline, confidence, character,

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[18]Even one of petitioner's experts conceded that "women have more chances for leadership at single-sex institutions" and that "men and women are treated differently in the classroom," a trend that "could be exacerbated in a co-educational environment." Pet. App. 73a & n.9.

and leadership skills for military and civilian life. Pet. App. 54a, 150a-51a, 155a, 203a-04a, 225a-27a.

VWIL was purposefully designed to provide these very same benefits to its students. Its mission is "to produce the 'citizen soldier,' *i.e.*, women who are trained for leadership in both civilian and military life," and it pursues "the same five goals as those pursued at VMI: education, military training, mental and physical discipline, character development, and leadership development." Pet. App. 8a, 63a.

The means employed by VWIL to achieve these same goals are similar in many respects to those employed by VMI, although the creators of VWIL chose not to adopt some aspects of VMI's educational method. Like VMI, VWIL emphasizes leadership and character development through an integrated and rigorous program of physical and mental challenges and leadership opportunities. Like VMI, VWIL includes military training leading to the possibility of a military career and prepares its students for positions of prominence in either civilian or military life. *See generally* Pet. App. 8a-10a, 25a-26a, 62a-64a, 67a.

VWIL's physical education regimen "is designed to be comparable in rigor and challenge to the physical training test for men at VMI," Pet. App. 112a, and is unsurpassed in the demands it imposes on women students. VWIL's co-curricular component uses "the highly disciplined schedule of the VMI model" (*id.* at 67a), and combines with the other elements of the VWIL program to provide an integrated system for the development of self-confident leaders. The VWIL program incorporates a mentoring scheme and a system of increasing authority, leadership, and responsibilities for upperclass students analogous to VMI's "dyke" and "class" systems. VWIL students are subject to an honor code and are organized along military lines to provide each student an opportunity to experience various roles in the military hierarchy. The ROTC and military career

opportunities available to VWIL students are coextensive with those for VMI's students. *See supra* pp. 8-9.[19]

Most importantly, VWIL (like VMI) affords its students the benefits of a single-sex college education. Petitioner virtually ignores this aspect of the VWIL program; petitioner's opening brief contains no recognition of the special benefits that single-sex education provides to the students who choose it. Petitioner's reluctance to acknowledge the importance of the single-sex nature of the VMI and VWIL programs, however, cannot change the crucial significance of that attribute of both programs. *See supra* Part I. Indeed, by providing women the opportunity to enroll in a publicly supported undergraduate program emphasizing leadership, military training, physical and mental rigor, and character development in a single-sex environment, VWIL provides a closer parallel to VMI's program than any co-educational school could hope to offer.

After carefully considering the design, structure, and goals of the VWIL program, the courts below found that the educational benefits provided by VWIL to its women students will be equivalent to those provided by VMI and that any differences in methodology are "attributable to a professional judgment of how best to provide the same opportunity." Pet. App. 26a, 28a, 76a, 83a. In particular, the district court found that "MBC is committed to providing to the VWIL women benefits that are equal to *or better than* the benefits provided to men at VMI," and concluded that VWIL "will achieve substantially similar outcomes in an all-female environment." *Id.* at 68a, 76a (emphasis added). This conclusion was based on the testimony of ac-

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[19] As the foregoing discussion demonstrates, petitioner is manifestly wrong when it asserts (U.S. Br. 9) that VWIL's designers "rejected every component of VMI's system."

knowledged experts in higher education who studied the VWIL program in detail. For example, Harvard University Professor David Riesman "concluded that VWIL will produce the kind of self-assurance in the face of accomplishment of difficulties that VMI offers and requires of its cadets." *Id.* at 75a-76a. Similarly, Dr. Richardson testified that VWIL will offer women "a comparable opportunity to achieve outcomes which men achieve at VMI." II Tr. 622; *accord* II DX 11K at 3 (II JA 155; L. 307). Dr. Elizabeth Fox-Genovese, "one of the leading experts on the educating of women, . . . concur[red] in th[at] assessment." Pet. App. 64a. In short, VWIL offers "an education for women equivalent in rigor, focus and outcome to that offered to men at VMI." II DX 11K at 6 (II JA 158; L. 310).

The court of appeals endorsed these conclusions. The court noted that "both VMI and VWIL are focused on results beyond simply awarding an undergraduate degree. Both seek to teach discipline and prepare students for leadership." Pet. App. 26a. Thus, "the mission and goals are the same, and the methodologies for attaining the goals, while different, nevertheless are reasonably calculated to succeed at each institution." *Id.* at 27a.[20]

Petitioner ignores these conclusions and argues (U.S. Br. 22-23) that VWIL's benefits are not comparable to VMI's because VWIL cannot offer "the benefits of association with an established and renowned institution" and its "'enormously influential'" alumni "network."[21] That con-

[20]Petitioner's experts conceded that "any given set of outcomes can be obtained by more than a single methodology." Pet. App. 68a.

[21]Petitioner also points to VMI's allegedly "powerful prestige" (U.S. Br. 20), but VMI does not enjoy the academic prestige of public coeducational institutions like the University of Virginia, the College of William and Mary, or VPI. VMI attracts

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tention overlooks the facts that MBC is a highly regarded institution in its own right with its own valuable "networks," and that VWIL's graduates *will* enjoy the benefits of access to the VMI alumni "network" as well. As noted above (*supra* p.2), MBC is one of the finest liberal arts colleges in the South. Moreover, "VWIL graduates will have the same access to the VMI placement network as VMI graduates." Pet. App. 121a; *see supra* p.11.[22]

For all the foregoing reasons, petitioner is incorrect in suggesting (U.S. Br. 46) that VMI and VWIL "are vastly different in content and in the value of the degree they offer." The record and findings below flatly contradict that assertion and demonstrate that VMI and VWIL provide comparable benefits through analogous, though not identical, single-sex educational programs designed by experts to accomplish precisely the same goals. Petitioner offers no

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"average" students, and its academic reputation is comparable to MBC's. Pet. App. 206a; II Tr. 244-45 (II JA 565-66).

[22]The Government's reliance (U.S. Br. 23) on *Sweatt v. Painter*, 339 U.S. 629 (1950), is wide of the mark. That case involved a *racial* classification, not a gender-based classification, and this Court has never applied (or even cited) *Sweatt* in a gender case. Moreover, there is (quite rightly) no suggestion in *Sweatt* that racial segregation of law students provides any meaningful or valid educational benefits, whereas the record in this case is clear that single-sex education at the college level does provide important pedagogical benefits that cannot be replicated in a coeducational setting. Finally, while VWIL itself is a new program, MBC is a respected institution with a 150-year history of successfully educating young women, and VWIL graduates will enjoy the added benefits of access to the VMI alumni network as well.

justification for ignoring these factual findings.[23]

B. The Differences Between VWIL And VMI Are Pedagogically Justified And Are Not Based On Archaic Stereotypes

VWIL was designed to provide the optimum environment for producing successful women leaders, and "[t]he methods by which this goal could be achieved were the subject of intensive study and planning by professionals who are leaders in the field of designing and implementing educational programs for women." Pet. App. 63a. VWIL's designers carefully incorporated the most persuasive and contemporary research on leadership development. Choosing to depart from certain aspects of VMI's extreme adversative method, they created an analogous, carefully tailored and rigorous program designed to achieve the same results while attracting and successfully educating a significant number of students.

The district court found that modern scholarship and research have identified "important differences between men and women in learning and developmental needs," and that these "psychological and sociological differences are real differences, not stereotypes." Pet. App. 224a, 225a. The court concluded that VWIL was carefully designed to achieve the same results as VMI by taking account of these factors. Thus, "the differences between VWIL and VMI are justified pedagogically and are not based on stereotyp-

[23]Petitioner's challenge to the adequacy of the remedy approved below also ignores the fact that district courts enjoy wide discretion in determining the proper scope of remedies for constitutional violations. This Court has "recognized that the choice of remedies to redress [equal protection violations] is 'a balancing process left, within appropriate constitutional or statutory limits, to the sound discretion of the trial court.'" *United States v. Paradise*, 480 U.S. 149, 184 (1987).

ing." *Id.* at 76a. The court of appeals agreed, explaining that "the difference [between VWIL and VMI] is attributable to a professional judgment of how best to provide the same opportunity." *Id.* at 26a.

Petitioner is unable to refute the conclusions of the experts and the factual findings of the courts below, so it simply substitutes its opinions for those findings, asserting (U.S. Br. 37-40) that every conclusion with which it disagrees is the product of impermissible stereotypes. That approach is unwarranted, for several reasons.

In the first place, neither respondents nor the courts below relied on any broad generalization that all women would prefer VWIL's methods to VMI's or that no woman could succeed in an adversative-type program. To the contrary, the MBC Task Force and respondents' experts recognized, and the district court found, that some women could succeed in, and "may" prefer, a program identical to VMI's. Pet. App. 76a; *see id.* at 8a; I Tr. 702 (I JA 949).

The expert analyses and testimony at trial demonstrated, however, that VMI's methodology would be ineffective or counterproductive for many, if not most, women college students. Pet. App. 73a-76a. The experts relied on their own years of experience and on scholarly studies demonstrating that many young women enter college with different needs than their average male counterparts in areas such as confidence and self-esteem and benefit appreciably from a challenging yet supportive single-sex college environment like that offered by the VWIL program. *Id.* at 73a-74a; II DX 130A (II JA 280-319). These experts concluded "that the VWIL approach towards educating and preparing women leaders was preferable to the VMI approach," and indeed that the VMI method would be counterproductive for, and have a "discriminatory impact on," many women students. Pet. App. 64a, 73a; II DX 11K at 4 (II JA 156).

The creators of VWIL could easily have chosen to model that program more precisely along the VMI lines, but their experience, education, study, and instincts led them to create a program that they believed would be vastly more successful in educating young women leaders in a single-sex environment. *See* Pet. App. 11a; II DX 11K at 6 (II JA 158; L. 310). The evidence, and the factual findings below, confirm the soundness of that judgment. Indeed, for VWIL's designers to have blindly and unthinkingly replicated VMI's methods would have made them guilty of precisely the sort of arbitrariness that petitioner purports to condemn. Professional educators are obviously in the best position to design and implement college programs aimed at developing successful leaders, and the results of that process in this case cannot legitimately be dismissed as stereotypical merely because they do not conform to petitioner's preconceived policy preferences.

Petitioner has combed the record below for snippets of testimony (U.S. Br. 37-40), much of it wholly unrelated to the VWIL program, in an attempt to bolster its claim that VWIL's design reflects stereotyped views. But that attempt to impugn as archaic stereotypes the scholarly conclusions cited above is directly contradicted by the findings below and ignores the fact that even petitioner's witnesses provided support for these conclusions. For example, a study conducted by one of *petitioner's* experts found that "the declines in psychological well-being (feeling depressed, feeling overwhelmed, low self-rating on emotional health) are all stronger among women than among men during the undergraduate years." II DX 104 at 404-05 (II JA 278; L. 346). Another of petitioner's experts conceded that "[t]he psychological and sociological differences between men and women are real differences, not stereotypes." Pet. App. 225a.

A third expert for petitioner admitted that "there clearly

are differences between men and women, and not only obvious physiological ones, but ones having to do in part with how they interact, how they learn and so on." I Tr. 377 (I JA 625); II Tr. 1083 (II JA 913). This expert further testified that he was not aware of any stereotyped views being expressed by the members of the MBC Task Force. II Tr. 1089-90 (II JA 918-19).

Although petitioner complains that VWIL is not identical to VMI, it is most telling that none of petitioner's experts was willing to recommend VMI's adversative method as an appropriate educational methodology for developing women leaders. Indeed, petitioner's experts testified that they were unaware of *any* educational authorities who advocated the VMI approach for educating women (II Tr. 956, 1105, 1301 (II JA 889, 923, 992)), and some stated that they would not recommend the adversative method for either men or women. II Tr. 902, 1300-01 (II JA 861, 991-92). Nor did petitioner's experts assert that the VWIL program would be inappropriate or ineffective for women. Pet. App. 68a, 76a. In fact, petitioner's expert on curricular and co-curricular offerings admitted that neither VMI's program nor VWIL's program was "better than the other." *Id.* at 69a n.5, 96a.

Petitioner's claim of impermissible stereotyping also ignores the fact that the demand among women college students for an adversative program like that offered at VMI is too small to make such a program workable. As detailed elsewhere (*see* Va. Br. 43-45), the evidence at trial showed that "there would be little demand for a female VMI" and that the VMI model "is deficient from the standpoint of attracting a sufficient clientele" from among women college students. Pet. App. 27a, 73a, 75a & n.12; II DX 11J at 5 (II JA 148; L. 300). Wholly aside from the pedagogical reasons for preferring the VWIL model, therefore, the differences between VWIL and VMI are justified by the need

to attract sufficient numbers of women students to make the program workable.[24]

At bottom, petitioner's challenge to the VWIL program rests upon a fundamental misconception about the nature of the stereotypes condemned by this Court's precedents. Petitioner assumes that a gender-based classification is invalid unless it relates to characteristics that hold true in every individual instance. But this Court's cases do not support such a categorical approach. In *Schlesinger v. Ballard*, 419 U.S. 498 (1975), for example, the Court upheld a statute granting female Navy officers longer tenure before mandatory discharge than their male counterparts. The Court specifically rejected the contention that the gender-based classification was based on impermissible "archaic and overbroad generalizations," explaining that female officers "will not *generally* have compiled records of seagoing service comparable to those of male[s]." *Id.* at 508 (emphasis added). The Court did not purport to require that this generalization be true in every instance; rather, the Court found it permissible because it reflected current reality rather than the types of outmoded stereotypes condemned in past cases. *See id.* at 507.[25]

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[24]That fact alone serves to distinguish this case from *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994), and other cases in which a woman's ability to receive a government benefit did not depend upon locating a substantial number of other qualified women willing and able to join her.

[25]As this Court noted in *Rostker v. Goldberg*, 453 U.S. 57, 71 (1981), "*Schlesinger* v. *Ballard* did not purport to apply a different equal protection test because of the military context." The *Ballard* Court did "stress the deference due congressional choices among alternatives" in the military context (*id.*), but deference is also due to the decisions of state and local governments regarding the best means of educating their citizens. *See, e.g., Wood v. Strickland*, 420 U.S. 308, 326

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Similarly, *Califano v. Webster*, 430 U.S. 313, 318 (1977), upheld a statute giving women higher social security benefits than men because "women . . . have been unfairly hindered from earning as much as men." Although this rationale was plainly not applicable to every affected individual, the Court expressly rejected the suggestion that it reflected "'archaic and overbroad generalizations' about women" or "'the role-typing society has long imposed' upon women, such as casual assumptions that women are 'the weaker sex' or are more likely to be child-rearers or dependents." 430 U.S. at 317 (citations omitted).[26]

The lesson to be drawn from this Court's gender discrimination cases, therefore, is that government is not precluded from relying on all demonstrable norms in adopting gender classifications. The stereotypes condemned by this Court's cases involved "archaic" assumptions and "outdated misconceptions" about men and women (*Craig v. Boren*, 429 U.S. 190, 198-99 (1976)) that were characteristic of the "role-typing society has long imposed" (*Stanton v. Stanton*, 421 U.S. 7, 15 (1975)), such as the stereotypes that "female spouses . . . would normally be dependent upon their husbands," *Weinberger v. Weisenfeld*, 420 U.S. 636, 643 (1975), that only "male workers' earnings are vital to the support of their families," *id.*, or that "the female [is]

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(1975); *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 55 (1973); *Wisconsin v. Yoder*, 406 U.S. 205, 234-35 (1972).

[26]Although these two cases involve classifications benefiting women, the standard for judging the constitutionality of gender classifications does not vary with the sex of the class benefited or the nature of the proffered justification. *Mississippi Univ. for Women v. Hogan*, 458 U.S. at 723, 724 n.9, 728.

destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas." *Stanton v. Stanton*, 421 U.S. at 14-15.

Thus, in reviewing the constitutionality of a gender classification, the role of the courts "is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women." *Mississippi Univ. for Women v. Hogan*, 458 U.S. at 725-26. Where the decision to utilize the challenged classification was not made "'unthinkingly' or 'reflexively'" as "the '"accidental by-product of a traditional way of thinking about females,"'" *Rostker v. Goldberg*, 453 U.S. 57, 72, 74 (1981), but instead "realistically reflects the fact that the sexes are not similarly situated in certain circumstances," *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 469 (1981) (plurality opinion), the classification will be upheld, even if its rationale cannot be said to apply with precision to every individual subject to it. *Id.*; *Rostker v. Goldberg*, 453 U.S. at 78; *Parham v. Hughes*, 441 U.S. 347, 354 (1979) (plurality opinion); *Schlesinger v. Ballard*, 419 U.S. at 508.

The VWIL program and its methodology are constitutional under these principles. Unlike the archaic and harmful stereotypes condemned in this Court's cases, VWIL is not based upon any outdated notions about the proper role of women in society. Quite the contrary, VWIL is founded on the principle that women's place in "the marketplace and the world of ideas" -- and in the military -- is the *same* as that of men, but that student demand and developmental norms make VWIL's methodology a more effective and practicable means of maximizing opportunities for the development of confident and successful women leaders. These conclusions reflect the thinking and experience of principled and committed educators, individuals who have

dedicated their lives to the education of women.

Plainly, therefore, VWIL is not founded on impermissible stereotypes that "deprive[] persons of their individual dignity and den[y] society the benefits of wide participation in political, economic, and cultural life." *Roberts v. United States Jaycees*, 468 U.S. 609, 625 (1984). In fact, VWIL's fundamental premise is the very antithesis of the stereotypes rejected by the Court in the past. VWIL rightly assumes that women can and will achieve success and leadership in business, politics, and the military to the same extent as men, and it is thoughtfully designed with the aid of modern scholarship and experienced educators to ensure that its graduates succeed in attaining those goals.

The foregoing discussion demonstrates the complete inaccuracy of petitioner's contention (U.S. Br. 40) that VMI and VWIL perpetuate the stereotype that "men, and not women, are fit to be strong leaders in the military and other fields." Petitioner attempts to analogize this case to *Mississippi University for Women v. Hogan*, but comparing VWIL to the school of nursing at issue in *Hogan* is nothing short of preposterous. That school fostered the outdated stereotype that nursing is a "women's" profession; VWIL, by contrast, cannot plausibly be said to foster the stereotype that women are not fit for leadership. Every woman who enrolls in VWIL is *required* to participate in ROTC so as to be prepared to assume a military leadership position, and everything about the VWIL program, including its mission, its curriculum, its co-curricular activities, its rigorous physical and mental regimen, and even its name, emphasizes the program's overarching goal of creating bold, effective women leaders.

It is equally false to suggest (U.S. Br. 24-25) that VMI sends the message that women are unfit for a rigorous military or similar career. VWIL's rigorous program for developing tough and independent leaders unequivocally

demonstrates Virginia's belief that women can and will attain leadership positions both in the military and elsewhere. Indeed, VMI, VWIL, and Virginia's public coeducational ROTC programs, including the coeducational Corps of Cadets at VPI, all provide precisely the same opportunity for students to pursue a military career. The district court specifically found that "nothing about the ROTC programs at VMI is unique to VMI other than the absence of women," and non-VMI students perform marginally *better* than VMI students in their ROTC programs. Pet. App. 116a-117a, 119a.[27] In short, there is no basis for petitioner's suggestion that women at VWIL will have less of an opportunity for a military career than men at VMI.

Petitioner also appears to contend (U.S. Br. 41-42) that the States are precluded from taking into account demonstrated differences among students in their respective educational needs when such differences "may themselves result from historical sex-based bias," because the law must not "'reinforce patterns of historical discrimination.'" Even if some of these demonstrable differences were shown to be the product of past discrimination -- a showing that petitioner has not made in this case -- it would hardly follow that educators must ignore these real differences in formulating programs of public education. Instead, the approach most in keeping with the Constitution's mandate of equal opportunity would be precisely that followed by the MBC Task Force here, namely, to develop programs that are designed to *overcome* and *eliminate* any lingering effects of societal stereotyping by developing self-confident graduates

[27]The military's ROTC programs do not utilize adversative training methods, and it is not necessary for students to be exposed to those methods or to the other aspects of the VMI program in order to succeed in ROTC and the military. Pet. App. 67a, 118a.

of both sexes who are equally well-equipped to seek and obtain leadership positions in all facets of American society, regardless of discredited notions about which gender is better suited to a particular job.

Indeed, petitioner's contrary argument is directly at odds with this Court's recognition that overcoming past discrimination against women is a legitimate and important state objective.[28] If, as petitioner contends, government is precluded from recognizing the lingering effects of discrimination and taking steps to counteract those effects based on the expert advice of experienced professionals, *no* gender classification aimed at compensating for past discrimination could survive constitutional attack. Petitioner states (U.S. Br. 45 n.32) that single-sex education may be justified by a "compensatory purpose," but that statement is impossible to reconcile with petitioner's strident rejection of the proposition that Virginia may take action in response to demonstrable differences in psychological and behavioral norms that may be attributable to societal influences.

The findings and expert evidence in the record demonstrate that single-sex education tends to *reduce* the effects of societal stereotyping on both men and women by making students "more likely to take the risk of choosing a career normally associated with the other sex," Pet. App. 226a, and that VWIL will be *more* effective than an adversative-type program at preparing most women students to assume leadership roles in modern society. *Id.* at 27a, 63a-64a, 73a-74a. If anything, therefore, it is *petitioner*, not respondents, who would "restrict men and women to socially assigned roles" by depriving women of the leadership development opportunities made possible through the VWIL

[28]*E.g.*, *Mississippi Univ. for Women v. Hogan*, 458 U.S. at 728; *Califano v. Webster*, 430 U.S. at 317.

program. Petitioner's dismissive attitude toward the rigor and effectiveness of the VWIL program is not only contrary to the record and findings below; it is insulting to the dedicated experts in women's education who created the program and the more than 40 young women who have already acted upon their desire to benefit from VWIL and its unique and challenging educational experience.

C. The Equal Protection Clause Does Not Require That Single-Sex Educational Programs Be Identical In All Respects

Petitioner contends (U.S. Br. 42-44) that VWIL is an inadequate remedy because it denies opportunity to any individual woman who might be qualified for and might prefer VMI's methodology. In effect, petitioner's argument is that a State cannot offer the admitted benefits of single-sex education to students of both genders if there is even one student who would prefer the program available to the other gender. That argument is without merit.

In the first place, as a factual matter it is simply not true that women are denied the educational benefits afforded to men at VMI. All of the academic offerings at VMI are available to women at other public institutions in Virginia, and VWIL is designed to provide the same educational benefits and produce the same educational outcomes as VMI. The courts below found that it will achieve that goal. Moreover, those women who might prefer VMI's adversative method could not obtain it in any event, because there is insufficient demand to permit implementation of that methodology in a separate program for women and because, as the courts below found, VMI (or any other school) would be compelled to eliminate or modify drastically that methodology in a coeducational setting. *See infra* pp. 43-47; Va. Br. 33-36, 43-45.

Second, petitioner's argument would, as a practical matter, entirely preclude state and local governments from funding single-sex educational programs of any kind for students of either gender, no matter how beneficial and important those programs may be to some students.[29] There will inevitably be some differences between parallel educational programs, whether in location, faculty, alumni, physical facilities, reputation, history, traditions, curriculum, size, methodology, or quality of student body. Recognizing this reality, the court of appeals held that the Constitution is satisfied as long as the educational benefits and outcomes provided by the parallel programs are substantively comparable, and found that VMI and VWIL satisfy that high standard. If, however, as petitioner contends, the existence of *any* difference deemed material by *any* student is sufficient to require invalidation of a single-sex admissions policy, public single-sex education becomes impossible.[30]

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[29]Petitioner reluctantly suggests (U.S. Br. 45 n.32) that single-sex education "may" be constitutional in furtherance of a "'compensatory purpose.'" In *Hogan*, however, this Court rejected that justification absent a "showing that women lacked opportunities to obtain training in the field of nursing or to attain positions of leadership in that field." 458 U.S. at 729. Women now participate fully and successfully at all levels of the educational system. Indeed, more women than men attend and graduate from college, and the percentage of high school graduates going on to college is higher for women than for men. U.S. Dep't of Education, National Center for Education Statistics, Digest of Education Statistics 176, 185, 188, 250 (1995). Petitioner's reluctance to endorse the "compensatory" rationale for single-sex education is thus amply justified.

[30]Moreover, direct and indirect public financial assistance (including tax exemptions) for private single-sex schools or for students attending those schools would likely be unavailable as well. This Court made clear in *Norwood v. Harrison*, 413 U.S. 455, 465 (1973), that "'a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.'" Thus, government

[Footnote continued on next page]

Petitioner's insistence on an absolutely precise means-end fit is particularly inappropriate in the context of education. Educational programs must of necessity be designed to accommodate group needs and preferences rather than the desires of individual students. *See* Pet. App. 172a; I Tr. 702 (I JA 949); II Tr. 697. Petitioner's approach would preclude innovative attempts by public schools to respond to demonstrable needs in a wide variety of circumstances, including all-girls' math and science classes, special single-sex programs for inner-city youths, and the like (*see* Va. Br. 39-41; Br. *Amicus Curiae* of Women's Schools Together, Inc., *et al.*), merely because the behavioral or psychological norms justifying the need for such programs are not applicable in *every* individual instance. Acceptance of petitioner's claim that the Constitution precludes reliance on any characteristics not uniformly applicable on gender lines would thus serve only to deny valuable opportunity to numerous students without providing concrete benefits to anyone. The impact of this rigid doctrine would, moreover, be felt most severely by students from economically and socially disadvantaged backgrounds, because it is precisely

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[Footnote continued from previous page]

could be barred from providing financial aid to students attending private single-sex schools if it could not maintain those schools itself. *See* Br. *Amicus Curiae* of Mary Baldwin College at 22-25. Petitioner cites *Blum v. Yaretsky*, 457 U.S. 991 (1982), and *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), for the contrary proposition (*see* U.S. Br. 45 n.31), but those cases hold only that public aid does not turn private entities into state actors or render the government liable for the actions of private parties. They do not contradict *Norwood*'s ban on public financial assistance to private organizations whose discriminatory admissions policies would violate the Constitution if practiced by the government.

those students who can often benefit most from a single-sex education and yet are least likely to be able to afford a private single-sex college. *Id.*; Pet. App. 71a, 74a.

In any event, petitioner is simply wrong as a matter of law in suggesting that a classification is invalid if there are any members of one gender as to whom the classification is not accurate. This Court has never held that there must be an absolutely precise fit between a gender-based classification and the interests served by it. In *Schlesinger v. Ballard*, for example, as noted above, the Court upheld a gender classification even though the Government had made no showing that the generalization supporting it was true in every instance. *See* 419 U.S. at 508-10 & n.13.[31]

Petitioner identifies no authority to the contrary. Instead, it cites cases invalidating gender classifications based on "'archaic'" and "'outdated'" assumptions or "'stereotypical

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[31]Other cases are to the same effect. *E.g.*, *Heckler v. Mathews*, 465 U.S. 728, 749 & n.15 (1984) (approving gender classification justified by need to protect individuals who "may reasonably be assumed" to have relied on prior law, without requiring proof that all of the individuals so benefited had relied or that all of the excluded individuals had not); *Rostker v. Goldberg*, 453 U.S. 57, 81 (1981) (rejecting challenge to exclusion of women from the draft even though "in the event of a draft of 650,000 the military could absorb some 80,000 female inductees"); *Califano v. Webster*, 430 U.S. at 318 (upholding higher social security benefits for women because "women . . . have been unfairly hindered from earning as much as men," without requiring proof that each woman so benefited had suffered discrimination or that each excluded man had not); *see also Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 579, 582-83 (1990) (classification need not be accurate "in every case" to survive intermediate scrutiny as long as it will, "in the aggregate," advance the underlying objective), *overruled in other part on other grounds*, *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995).

notions'" containing at most a "'shred of truth.'" U.S. Br. 43 n.29; *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1427 n.11 (1994). As explained above, the differences between VMI and VWIL are not based on such impermissible stereotypes, but are instead predicated on the expert knowledge, advice, and research of highly regarded professional educators and social scientists. The cases cited by petitioner are therefore inapposite.

Moreover, none of the cases cited by petitioner purports to require the degree of tailoring that petitioner seeks. The classification invalidated in *Craig v. Boren*, 429 U.S. 190 (1976), for example, was highly imprecise. *Id.* at 201-03 & n.16. Likewise, most of the empirical evidence in *J.E.B.* refuted the existence of *any* correlation between gender and juror attitudes. 114 S. Ct. at 1426-27 & n.9. *See also Hogan*, 458 U.S. at 731 (record was "flatly inconsistent" with proffered justification); *Frontiero v. Richardson*, 411 U.S. 677, 689 (1973) (plurality opinion) ("no concrete evidence" supporting proffered justification).

Petitioner's argument that the justifications for gender classifications must be applicable in every individual instance is, in effect, an attempt to incorporate the narrow-tailoring requirement of strict scrutiny into the intermediate scrutiny context. This Court's precedents do not permit that approach, however, and its adoption would effectively overrule numerous decisions of this Court and invalidate scores of federal and state laws and programs.

III. THE EQUAL PROTECTION CLAUSE DOES NOT MANDATE COEDUCATION AS THE ONLY PERMISSIBLE REMEDY IN THIS CASE

Petitioner contends that VMI must become coeducational

in order to provide a "complete remedy." U.S. Br. 21.[32] The record and findings below conclusively demonstrate, however, that VWIL in fact provides a far more effective and complete remedy than a coeducational VMI would offer. Most importantly, VWIL extends the proven and substantial benefits of a single-sex college education to women. Petitioner's preferred remedy, by contrast, would deny those benefits to both women and men.

In addition, as both courts below found, neither women nor men would receive the benefits of VMI's adversative method if VMI were to become coeducational, because the need to attract and accommodate a different student population would necessarily lead to fundamental changes in that method. *See* Va. Br. 16-19, 34-36. Petitioner disagrees with that factual finding, but its attempt to reargue the facts in this Court, armed only with its own opinions, is both improper and unavailing.

For example, petitioner ignores the record in asserting (U.S. Br. 27-28) that the creation of privacy rights on gender grounds would not affect VMI's methodology. The VMI method operates by breaking down and eliminating distinctions between students and building group identity within the entire class by subjecting everyone to exactly the

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[32]Petitioner also claims (U.S. Br. 21, 26) that the "presumptive remedy" for an invalid exclusion is elimination of the benefits being afforded to the unconstitutionally favored class. The Court's equal protection cases are to the contrary. *See, e.g., Heckler v. Mathews*, 465 U.S. at 738-39 & n.5. Petitioner relies on *Orr v. Orr*, 440 U.S. 268, 283 (1979) (*see* U.S. Br. 21), but that case merely holds that a State cannot maintain a gender-based classification where its purposes are "as well served by a gender-neutral classification." Because Virginia's objective of providing the option and benefits of a public single-sex college education is not served at *all* by a gender-neutral classification, *Orr* is inapposite.

same standards and to the constant scrutiny of all other students. Pet. App. 6a, 23a, 191a-92a, 194a, 197a, 233a, 237a. A system of separate privacy rights within each class for groups of students defined by their gender would thus be directly contrary to central attributes of the VMI method. The courts below found that the absence of privacy is "essential to the leveling process," *id.* at 6a, but coeducation would frustrate that process by separating VMI's student body into two distinct gender groups, each continually asserting privacy rights as against the other.

For the same reasons, petitioner's claim (U.S. Br. 28-29) that VMI's method would not be affected by the adoption of "ability groupings" or other "accommodations" for the physical differences between men and women is simply false. The courts below found that VMI's egalitarianism, including its imposition of identical physical standards on all students, was an essential element of its program. Pet. App. 146a-47a, 237a-38a.[33] That egalitarian ethic would be severely undermined by abandonment of uniform physical standards, causing male and female students to "perceive the treatment of them as unequal." Pet. App. 147a.

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[33]Petitioner suggests (U.S. Br. 29) that VMI already accommodates physical differences, because many students fail the physical fitness test at least once. But VMI does not purport to eliminate physical differences among students. Instead, the crucial attribute of VMI's methodology is its insistence on imposing the same standards, including the same physical fitness test, on all students. All students are subject to the same fitness test and suffer the same consequence for failure to pass it (namely, a failing grade on that portion of the semester's physical fitness course). I Tr. 316-17 (I JA 564-65). The fact that participants in varsity sports miss a fraction of the physical training program while at practice is beside the point, because they are still subject to the same fitness standards and they participate in precisely the same activities at all other times. I Tr. 111-12 (I JA 359-60); Pet. App. 195a.

Petitioner makes no effort to refute the factual findings below that VMI's adversative method could not accommodate the effects of the cross-gender harassment that would result from an attempt to employ that method in a coeducational setting. Instead, petitioner erroneously contends that the court of appeals' reliance on this fact is "impermissible" because it reflects "'romantic paternalism'" about what behavior is "unseemly." U.S. Br. 30.

The district court found, and the court of appeals agreed, that the adversative system would necessarily undergo fundamental changes if VMI were to become coeducational. Pet. App. 6a, 147a, 227a, 238a-39a. That finding was not based on an assumption that cross-gender confrontation is "unseemly" but on expert testimony and the experience of the U.S. military academies, which demonstrated that the reality of cross-gender interactions and relationships between college students would inevitably lead to substantial changes in the ethic of absolute egalitarianism and the intentional harassment and intimidation that characterize the adversative method. *Id.*; *see* Va. Br. 34-36. No matter how much petitioner would like to pretend that college students always interact with members of the opposite sex in precisely the same way that they interact with members of the same sex, the record and findings below (as well as common sense) are to the contrary.[34] Moreover, petitioner's attempt to dismiss the seriousness of these concerns

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[34]Even petitioner's education expert conceded that aspects of the VMI experience would be "deeply affected" by coeducation and that the admission of women would be "a pretty dramatic clientele change" that would necessarily produce "major . . . consequences, for the academic system, for the athletic system and for the lifestyle system." I Tr. 365, 368, 399 (I JA 613, 616, 647). He also stated that "[t]hese [changes] are not insignificant and in no way would I diminish their importance." I Tr. 365 (I JA 613).

is, at best, disingenuous, because petitioner affirmatively argued below that the adversative method would have to be altered so as to avoid "harassment" deemed inappropriate for women. II JA 101.[35]

Petitioner also contends (U.S. Br. 27, 31-32) that VMI would not be "destroy[ed]" by coeducation, and points to the transformation of the service academies from single-sex to coeducational institutions. It is no doubt true that VMI could survive as a college if it were to admit women. The central point, however, is that it would no longer offer the benefits of single-sex education, nor would it be able to retain the adversative system. VMI would instead become nothing more than a pale shadow of the service academies, far less attractive to students because unable to guarantee free tuition, student pay, or an active-duty military commission, and indistinguishable in its methodology from the coeducational Corps of Cadets and ROTC program already available at VPI. Pet. App. 173a; I DX 58 at 25 (I JA 1757; L. 225).

Indeed, far from supporting petitioner's contentions, the experience of the service academies further bolsters the conclusion that VMI's adversative methodology would not

[35]Petitioner also insisted that VMI would have to enforce "a zero tolerance policy in regard to acts of gender discrimination and harassment committed by cadets," that VMI would be required to "make available to all cadets counseling services relating to problems of discrimination or harassment on the basis of gender," and that "[l]ying about any violations of regulations governing gender discrimination or harassment shall be treated as an Honor Code violation." II JA 101, 103-04. Petitioner has yet to explain how the extreme harassment and intimidation inherent in the adversative method could be implemented in a coeducational setting without creating a "hostile environment" constituting impermissible sexual harassment.

survive coeducation. *See* Va. Br. 34-35; Pet. App. 172a n.8, 235a-41a. Approval of petitioner's arguments would thus deprive both women and men of an educational option they now have -- namely, a single-sex college education focused on leadership, character development, and military training -- without extending to them any educational opportunity that is not already available elsewhere. Petitioner's insistence that VMI must admit women (and, implicitly, that VWIL must admit men) is thus an attempt to lessen diversity in public higher education by mandating conformity and coeducation. The Constitution should not be construed to incorporate petitioner's view that coeducation is the only acceptable method for educating college students in public institutions.

IV. STRICT SCRUTINY IS NOT APPLICABLE IN THIS CASE

For the first time in this case, petitioner asserts (U.S. Br. 17-18, 33-36) that gender-based classifications should be subjected to strict judicial scrutiny. This Court should decline petitioner's untimely invitation to address that issue, which was neither pressed nor passed upon below.

A. The Issue Of Strict Scrutiny Issue Is Not Properly Presented

Petitioner has waived the issue of strict scrutiny by failing to raise that issue at any stage of this case prior to the filing of its opening brief on the merits in this Court. Indeed, in the district court, petitioner affirmatively scorned the very position it now advances, asserting that "the United States has never argued that this Court should abandon the Supreme Court's well-settled adherence to the intermediate standard of review in gender classification cases." R. 88, at 3. Petitioner announced that the Government's position was "*unequivocally* that the appropriate standard in this case is 'intermediate scrutiny,' and that a classification

based on gender must be 'substantially related to the achievement of a sufficiently important governmental objective.'" *Id.* (emphasis added).

Petitioner consistently adhered to that position in the court of appeals.[36] And in reliance on petitioner's concessions, the courts below did not address the question of strict scrutiny at all. That question is, therefore, not properly before the Court. *Zobrest v. Catalina Foothills School Dist.*, 113 S. Ct. 2462, 2466 (1993); *Yee v. City of Escondido*, 503 U.S. 519, 532-33 (1992); *Demarest v. Manspeaker*, 498 U.S. 184, 188-189 (1991).

Petitioner's attempt to inject the issue of strict scrutiny at this stage of the proceedings is particularly inappropriate given the contrary position advanced by petitioner the last time the case reached this Court. In opposing certiorari at the liability stage, petitioner affirmatively represented to this Court that "*Hogan* supplies the test for determining whether VMI's male-only admissions policy violates the Equal Protection Clause of the Fourteenth Amendment." 92-1213 Br. in Opp. 9.[37] Petitioner should not be permitted an eleventh-hour change in its legal posture after insisting on a contrary position for more than five years of litigation at all levels of the federal judiciary.

B. Strict Scrutiny Should Not Apply To Gender Classifications

As petitioner has observed, intermediate scrutiny is one of this Court's "'firmly established principles' for evaluat-

[36] *See* 91-1690 Gov't C.A. Reply Br. 4; *see also* 94-1667 Gov't C.A. Br. 8; 91-1690 Gov't C.A. Br. 21, 23-29.

[37] Petitioner reaffirmed that position at the certiorari stage after the remedial decision below. *See* 94-1941 Pet. 19; 94-1941 Pet. Reply Br. 5-10; 94-2107 Cross-Pet. Br. in Opp. 5 & n.2.

ing claims of gender discrimination." R. 88 at 3. Indeed, this Court has applied that standard in every gender-based equal protection case since at least *Craig v. Boren*, 429 U.S. 190 (1976). Adoption of strict scrutiny for gender classifications would require the Court to overrule numerous prior decisions applying intermediate scrutiny to uphold gender-based classifications.[38]

"[A]ny departure from the doctrine of *stare decisis* demands special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). Petitioner does not even attempt to offer any "special justification" for its last-minute request that the Court reject two decades of constitutional jurisprudence.

Instead, petitioner merely confirms the inappropriateness of strict scrutiny for gender classifications by seeking to exempt the military from the impact of that standard. U.S. Br. 34 n.23. Petitioner's advocacy of a form of qualified or selective strict scrutiny is wholly incompatible with this Court's equal protection jurisprudence, which demonstrates that "inherently suspect" classifications may not be treated as suspect only some of the time. *See Adarand Constructors, Inc. v. Pena*, 115 S. Ct. at 2113; *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989). Deference to military affairs would not insulate the military's widespread disparate treatment of men and women from strict scrutiny any more than it would permit the military to reinstitute racially segregated units. *See Rostker v. Goldberg*, 453 U.S. at 69-71 (the military is subject to the same standard applied to other gender classifications, and "deference [to military decisionmaking] does not mean abdication").

[38] *E.g.*, *Heckler v. Mathews*, 465 U.S. 728 (1984); *Michael M. v. Superior Ct. of Sonoma Cty.*, 450 U.S. 464 (1981); *Parham v. Hughes*, 441 U.S. 347 (1979); *Califano v. Webster*, 430 U.S. 313 (1977); *Schlesinger v. Ballard*, 419 U.S. 498 (1975).

In truth, intermediate scrutiny has achieved the worthy and balanced goal of invalidating most governmental line-drawing based on gender while preserving those relatively few gender distinctions that are supported by legitimate and important reasons. Adoption of strict scrutiny would serve only to bring into question the constitutionality of those remaining gender classifications that do serve important and valid governmental objectives, particularly in the military, prisons, and education. Petitioner fails to identify any need for achieving that result. Indeed, petitioner's change of heart regarding the standard for judging gender classifications appears to reflect nothing more than petitioner's implicit recognition that public single-sex education like that at VMI and VWIL can and should survive intermediate scrutiny.[39]

CONCLUSION

Virginia has developed a higher education program that includes recognition of the fact, endorsed widely by experts in education, that some students benefit greatly from single-sex colleges and develop into successful, confident adults more readily in such an environment. The Equal Protection Clause does not prohibit States from offering that opportunity to its young women and men in parallel programs developed by experts to meet the needs of young people. The judgment of the court of appeals should be affirmed.

December 15, 1995 Respectfully submitted.

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[39]In addition to the reasons set forth above, strict scrutiny is also inappropriate in the gender context for the reasons set forth in the briefs *amicus curiae* of the State of Wyoming, *et al.*, and the Independent Women's Forum, *et al.*

JAMES S. GILMORE, III
Attorney General of Virginia
WILLIAM H. HURD
Deputy Attorney General
900 East Main Street
Richmond, Virginia 23219

GRIFFIN B. BELL
WILLIAM A. CLINEBURG, JR.
KING & SPALDING
191 Peachtree Street
Atlanta, Georgia 30303

THEODORE B. OLSON
(Counsel of Record)
THOMAS G. HUNGAR
D. JARRETT ARP
GIBSON, DUNN & CRUTCHER
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500

ROBERT H. PATTERSON, JR.
ANNE MARIE WHITTEMORE
WILLIAM G. BROADDUS
J. WILLIAM BOLAND
McGUIRE, WOODS, BATTLE
& BOOTHE
One James Center
Richmond, Virginia 23219

Counsel for Respondents